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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9 WESTERN DIVISION
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11 MARIA SALVADOR HERNANDEZ,) No. CV 13-07755-VBK
12)
13 Plaintiff,) MEMORANDUM OPINION
14) AND ORDER
15 v.)
16) (Social Security Case)
17 CAROLYN W. COLVIN, Acting)
18 Commissioner of Social)
19 Security,)
20)
21 Defendant.)
22 _____)
23)
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18 This matter is before the Court for review of the decision by the
19 Commissioner of Social Security denying Plaintiff's application for
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have
21 consented that the case may be handled by the Magistrate Judge. The
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to
23 enter judgment upon the pleadings and transcript of the Administrative
24 Record ("AR") before the Commissioner. The parties have filed the
25 Joint Stipulation ("JS"), and the Commissioner has filed the certified
26 AR.

27 Plaintiff raises the following issues:

28 1. Whether the Administrative Law Judge ("ALJ") properly

1 evaluated Plaintiff's credibility;

2 2. Whether the ALJ properly weighed the opinions of Plaintiff's
3 treating physician, Dr. Vazquez; and

4 3. Whether the ALJ erred in determining Plaintiff's residual
5 functional capacity.

6 (JS at pp. 2 and 3.)
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8 This Memorandum Opinion will constitute the Court's findings of
9 fact and conclusions of law. After reviewing the matter, the Court
10 concludes that for the reasons set forth, the decision of the
11 Commissioner must be reversed and the matter remanded.
12

13 I

14 **THE FLAWED CREDIBILITY FINDING BY THE ALJ MANDATES**

15 **REVERSAL AND REMAND FOR A NEW HEARING**

16 On June 29, 2009, Plaintiff had open heart surgery in which her
17 aortic valve was replaced. (AR 159-162.) She had also been diagnosed
18 prior to the surgery with a severely dilated left ventricle, which was
19 not repaired during the surgery. (AR 163-164.)

20 Following the heart surgery, Plaintiff was treated by several
21 physicians. Dr. Mukherjee functioned as Plaintiff's treating
22 cardiologist from the time she was admitted to the hospital for heart
23 surgery through October 31, 2011. (AR 166-170, 307-313.) During his
24 treatment of Plaintiff, Dr. Mukherjee noted that Plaintiff stated she
25 feels tired (AR 170); that she had occasional dizziness (AR 169); that
26 she feels a "hot flash" when walking and had occasional dizziness and
27 felt fatigue (AR 167, 311); that she complained of fatigue after her
28 surgery (AR 166); that she indicated she feels "tired for five months

1 all the time" (AR 313); that she was walking and complained of having
2 dizziness (AR 308); and that she was tired and dizzy and had increased
3 blood pressure (AR 320).

4 Dr. Vazquez functioned as Plaintiff's primary care physician,
5 treating her before and after her open heart surgery, from June 27,
6 2008 through November 17, 2011. (AR 188-270, 316-368.) After the
7 surgery, on July 28, 2009, Plaintiff presented to Dr. Vazquez with
8 complaints of fatigue and dizziness, and he diagnosed her with "easy
9 fatiguability and dizziness." (AR 205.) Further, on March 31, 2010,
10 Dr. Vazquez documented that Plaintiff became dizzy if she was doing
11 too much exercise, defined as more than 10 to 15 minutes. (AR 195.) On
12 July 21, 2010, Dr. Vazquez reported that Plaintiff gets tired if she
13 is driving (AR 190), and on September 16, 2010, Dr. Vazquez reported
14 that Plaintiff's fatigue occurred with less than five minutes of
15 ambulation; and that she brings her children to school one way for
16 five minutes and then comes back. (AR 189.) On November 3, 2010, Dr.
17 Vazquez indicated that when she bent down to get her slippers felt
18 dizzy, fell to the floor and fell asleep. (AR 188.) On November 18,
19 2010 Dr. Vazquez indicated that Plaintiff was easily fatigued; that
20 this fatigue was chronic and exacerbated or accompanied by prolonged
21 walking; and was relieved with rest. The documentation by Dr. Vazquez
22 of Plaintiff's dizziness continued on January 25, 2011 and February
23 11, 2011. (AR 331, 332.) On February 22, 2011, Dr. Vazquez indicated
24 that Plaintiff had complained of fatigue since her 2009 surgery, and
25 diagnosed her with fatigue with an unclear cause. (AR 333.) On April
26 11, 2011, Dr. Vazquez indicated that Plaintiff was doing well except
27 for occasional dizziness when she walked (AR 328), and he advised her
28 to walk 10 to 15 minutes. (AR 328.) On May 24, 2011, Dr. Vazquez

1 reported that Plaintiff had intermittent shortness of breath and that
2 she fatigued easily since her surgery. (AR 326.) Finally, on November
3 11, 2011, Dr. Vazquez reported that Plaintiff continued with episodes
4 of extreme fatigue and dizziness, and he diagnosed "fatigue - multi
5 factor." (AR 316.)

6 A hearing occurred before the ALJ on March 14, 2012. (AR 30-48.)
7 During this brief proceeding, substantial testimony was taken from
8 Plaintiff concerning her activities of daily living. She indicated she
9 sometimes takes her children to school but not to after school
10 activities. (AR 36.) She and her husband do talk with their neighbors
11 and socialize "but not like we did before," because she gets tired
12 very easily. (AR 37.) When the ALJ said, "So if I understand it, you
13 take care of the house and the children and the cooking and the
14 cleaning and the laundry," Plaintiff disagreed, saying that she only
15 cooks when she can; her daughters do the cleaning because they are in
16 high school; she sometimes starts cleaning but then gets tired, and
17 her daughters finish it; that she no longer can take her sons to
18 football practice; that after her surgery she got very tired,
19 including while she was driving, and that this persists; that she gets
20 fatigue and dizziness symptoms at least four days a week and they are
21 "very, very severe;" that the only medicines the doctor gives her are
22 for anxiety, but that makes her fatigued even further. She naps
23 sometimes twice a day for up to an hour or an hour and a half; her
24 cousin brought her to the hearing; she does not have the strength to
25 successfully wash dishes or easily lift even a gallon of milk; she
26 gets tired when she walks, and she has to sit down and lift up her
27 legs because they get swollen; Dr. Vazquez told her to elevate her
28 feet and keep them level for 15 or 20 minutes; she can only walk about

1 half a block before she has to stop; and that she can only sit down
2 for a short time and then has to begin standing up frequently after 15
3 to 30 minutes. (See, generally, AR 35-43.)

4 Plaintiff's general treating physician, Dr. Vazquez, stated in a
5 questionnaire that, among other things, Plaintiff can walk a half-
6 block without rest or severe pain; that she can sit for up to 30
7 minutes at a time; that she can only stand for 15 minutes at a time;
8 that she can sit less than two hours in an eight-hour work day; that
9 she would sometimes need to take unscheduled breaks during an eight-
10 hour work day; that she can rarely lift less than 10 pounds and never
11 more than 10 pounds; and that she would likely be absent from work
12 more than four days per month. (AR 302-305.) At the hearing, testimony
13 was taken from a Vocational Expert ("VE"). The ALJ posited a
14 hypothetical question that limited the individual to sedentary work
15 with certain additional limitations. The VE then identified available
16 jobs within these restrictions. (AR 45-46.) In response to questions
17 posed by Plaintiff's attorney, which posited additional limitations,
18 including the necessity to have her legs elevated 40% of the time, the
19 VE indicated there would not be any available work. (AR 46-47.)

20 In the decision, the ALJ made credibility findings as follows:

21 "The claimant is found to be partially credible because
22 she has some limitations, but not to the extent alleged."

23 (AR 18.)
24

25 This finding was followed by specific reasons upon which it was
26 based, identified as the following:

27 "(1) the medical evidence records do not support Plaintiff's
28 allegations of such extreme fatigue; Plaintiff has

1 engaged in a somewhat normal level of daily activity
2 and interaction; despite Plaintiff's allegations, she
3 traveled to Mexico in 2011; and although she alleged
4 difficulty concentrating, the ALJ observed that this
5 was not the case at the hearing."

6 (AR 18.)
7

8 The Court need not extensively discuss the regulations and case
9 law which govern credibility assessment, as this is perhaps the most
10 common issue presented in Social Security litigation. A brief overview
11 will suffice. First, 20 C.F.R. § 404.1529(a) allows consideration of
12 the extent to which objective medical evidence supports pain
13 complaints. This includes consideration of a claimant's statements
14 about pain, although these statements alone are not determinative of
15 disability. The regulations also recognize that symptoms may suggest
16 a greater severity of impairment than can be shown by objective
17 medical evidence alone. See 20 C.F.R. § 404.1529(c)(3).

18 Apart from consideration of objective medical evidence as one
19 factor, the regulations mandate consideration of other evidence which
20 is listed and includes daily activities; location, duration,
21 frequency, and intensity of pain or other symptoms; precipitating and
22 aggravating factors; medication and its side effects; treatment; and
23 any other measures used to relieve pain. See 20 C.F.R. §
24 404.1529(c)(3)(I)-(vii). The Court's review of credibility findings
25 assesses whether substantial evidence supports the articulated reasons
26 set forth by the ALJ. Thus, the Court will review only the credibility
27 assessment factors cited by the ALJ in the decision.

28 First, regarding objective medical evidence, the ALJ's summary

1 and evaluation as set forth in the Decision do not accurately
2 encompass the overall chronological record. Apart from noting that
3 after surgery she was at times doing "extremely well," and that she
4 was maintained on "routine and conservative treatment with medication
5 management," the ALJ failed to accurately characterize these records,
6 which, in fact, seem to document a continuous course of fatigue and
7 dizziness, with accompanying functional effects, from just after the
8 2009 heart surgery, continuing through late 2011. With regard to the
9 ALJ's reliance on Plaintiff's receipt of "routine and conservative
10 care," there is no evidence in the record, such as from a testifying
11 medical expert, that there might have been more aggressive treatment,
12 whether by medication or otherwise, which could have alleviated
13 Plaintiff's pain and fatigue. Thus, the ALJ's reliance on this factor
14 amounts to a lay opinion which is not entitled to substantial weight.
15 Moreover, despite the Commissioner's argument that, if it existed,
16 Plaintiff's hypertension and diabetes were present because she had not
17 properly taken medications (see JS at 14, et seq.), this factor was
18 not mentioned in the ALJ's decision, and thus cannot be relied upon by
19 the Commissioner, much less the Court, in evaluating whether the ALJ's
20 determination was supported by substantial evidence. It is only
21 evidence relied upon by an ALJ that can be considered in this
22 litigation. Moreover, the Court must look to the articulated reasons
23 to determine if they are "specific, clear and convincing reasons." See
24 Vasquez v. Astrue, 572 F.3d 586, 592 (9th Cir. 2009); Orn v. Astrue,
25 495 F.3d 625 (9th Cir. 2007).

26 The ALJ's reliance upon Plaintiff's activities of daily living is
27 similarly misplaced, because, quite simply, he overstated what she is
28 able to do on a daily basis. This is apparent from the question which

1 he posed at the hearing (see AR 37), and the ensuing testimony in
2 which Plaintiff, as it turns out, unsuccessfully attempted to correct
3 the ALJ's perception of the extent of her daily activities. This was
4 made extremely clear in the examination of Plaintiff by her attorney.
5 (AR 38-43.) The record as it exists does not support an inference that
6 Plaintiff's activities of daily living rise to a level transferable
7 even to sedentary work skills.

8 The third of four reasons cited by the ALJ is that Plaintiff was
9 able to travel to Mexico in 2011. (AR 18.) Standing alone, there is no
10 way to determine if this constitutes substantial evidence to be
11 utilized in the credibility evaluation process, since there was no
12 testimony whatsoever on this issue, and thus no way to determine the
13 reason for the trip. What does appear in the record, however, is that
14 while in Mexico, on August 10, 2011, Plaintiff sought care from a
15 cardiologist. (AR 293-300, 421-435.) These records indicate that
16 Plaintiff reported to the Mexican medical facility with very high
17 blood pressure readings. Her medications were adjusted. All in all,
18 without more, the Court finds that this credibility assessment factor
19 could not be relied upon because of the lack of any further specific
20 information.

21 The final reason cited by the ALJ in finding Plaintiff not
22 credible was that, despite her testimony that she had difficulty
23 concentrating, he observed otherwise during the approximately 31
24 minute hearing. (AR 31.) Plaintiff's counsel describes this as
25 disfavored "sit and squirm" jurisprudence, citing Perminster v.
26 Heckler, 765 F.2d 870, 872 (9th Cir. 1985). While there is certainly
27 case law that does allow an ALJ to rely on some observations of a
28 claimant at a hearing, in this case, the hearing was extremely brief,

1 and the Court does not perceive that whether or not the ALJ felt that
2 Plaintiff was able to concentrate on the questions and answers at the
3 hearing have a causal relationship to her complaints of fatigue and
4 pain.

5 For the foregoing reasons, this matter will be remanded for a new
6 hearing and at that hearing, Plaintiff's credibility will be assessed
7 de novo.

8
9 II

10 **THIS MATTER MUST ALSO BE REMANDED SO THAT THE OPINION OF**
11 **TREATING PHYSICIAN DR. VAZQUEZ CAN BE EVALUATED DE NOVO**

12 The Court has already summarized in this Memorandum Opinion the
13 treatment record of Dr. Vazquez over a period of approximately three
14 years. In the ALJ's decision, however, the opinion of Dr. Vazquez was
15 given little weight, "because it is not supported by objective
16 evidence and it is inconsistent with the record as a whole." In
17 particular, the ALJ rejected the Questionnaire of October 27, 2011,
18 which has been partially summarized by the Court in this Memorandum
19 Opinion, as being inconsistent with objective findings; inconsistent
20 with the course of treatment pursued by Dr. Vazquez; and inconsistent
21 with Plaintiff's activities of daily living. (See AR at 20.)

22 It is well recognized that Dr. Vazquez' opinion should be given
23 special weight as a treating physician, although it is not mandated
24 that it be accepted by the ALJ. If the opinion is depreciated, as it
25 was in this case, however, the ALJ must make findings based on
26 specific and legitimate reasons from evidence in the record. See
27 Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996).

28 Much of the Court's discussion here incorporates its findings and

1 conclusions with regard to the first issue that concerns the
2 assessment of Plaintiff's credibility. In particular, as the Court has
3 already noted, Dr. Vazquez routinely reported that after her surgery,
4 Plaintiff had fairly consistent symptoms of fatigue and pain, which
5 had serious functional effects. The ALJ faulted Dr. Vazquez for
6 failing to provide an explanation for the functional limitations
7 assessed in the Questionnaire of October 27, 2011; however, this
8 conclusion effectively bypasses the fact that subjective pain and
9 fatigue, which Dr. Vazquez assessed, constituted a foundation for the
10 functional assessments. Consequently, if these subjective symptoms are
11 to be accepted, this would likely impact the evaluation of Dr.
12 Vazquez' opinion. As the Court has already found, Plaintiff's
13 credibility as to subjective symptoms must be reevaluated on remand.

14 The ALJ's conclusion that Dr. Vazquez' course of treatment has
15 not been consistent with what one would "expect" if Plaintiff were
16 truly disabled constitutes a lay opinion which does not appear to be
17 supported by expert opinion, such as might have been provided by a
18 testifying medical expert. Further, the ALJ's reliance upon the
19 inconsistency between Dr. Vazquez' functional assessment and
20 Plaintiff's "admitted activities of daily living" is not an
21 appropriate credibility assessment factor, because, as this Court has
22 noted in its discussion of the first issue, the ALJ's assessment of
23 Plaintiff's activities of daily living appears to be inconsistent with
24 the actual evidence in the record.

25 The Court need not devote substantial time to assessing
26 Plaintiff's third issue, which questions whether the ALJ erred in
27 determining her residual functional capacity ("RFC"), because the
28 ALJ's determination of Plaintiff's RFC was based in part upon his

1 evaluation of Plaintiff's credibility, in addition to the depreciated
2 credibility assessment accorded to Plaintiff's treating physicians.
3 Since these matters must be evaluated de novo on remand, similarly,
4 Plaintiff's RFC must be determined de novo after an evaluation of the
5 evidence, including the opinions of Plaintiff's treating physicians
6 and an evaluation of Plaintiff's credibility as to her subjective
7 symptoms.

8 For the foregoing reasons, this matter will be remanded for
9 further hearing consistent with this Memorandum Opinion.

10 **IT IS SO ORDERED.**

11
12 DATED: July 29, 2014

13 /s/
VICTOR B. KENTON
UNITED STATES MAGISTRATE JUDGE